**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION SIX**

M & M Sheet Metal & Steel Fabricators, Inc.

Employer-Petitioner

and

**Case** 6-RM-729

Sheet Metal Workers International Association Local No. 44, AFL-CIO[1]

Union

## REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer-Petitioner, M & M Sheet Metal & Steel Fabricators, Inc., operates a sheet metal manufacturing, fabrication and installation business in Williamsport, Pennsylvania, where it employs about 7 full-time employees. The Union, Sheet Metal Workers International Association Local No. 44, AFL-CIO, asserts that it represents a unit of employees, and that these employees are covered under a current collective-bargaining agreement. The Employer-Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking an election. A hearing officer of the Board held a hearing and the Union filed a timely brief with me.

As evidenced at the hearing and in the brief, the parties disagree on the following three issues: first, whether the Employer is still engaged primarily in the building and construction industry; second, whether there is a question concerning representation; and third, whether there is a contract bar.

[1] The Union's name appears as amended at the hearing.

The Employer contends that the fundamental nature of its business has changed from the fabrication and installation of sheet metal items to primarily the manufacture of sheet metal items. The Employer contends that although it had been engaged primarily in the building and construction industry in the past, it is now engaged primarily in manufacturing so that there can no longer be an 8(f) relationship between the parties.[2] The Employer further contends that the Union's demand that it represents the employees, the Union's demand that the Employer sign a successor contract obtained in arbitration and the Union's claim of majority status raise a question concerning representation.

The Union asserts that the Employer is still primarily engaged in the building and construction industry. Therefore, the Union contends that it merely wants to continue the parties' previous 8(f) relationship, and that accordingly there is no question concerning representation based on its conduct. Further, the Union argues that there is a current contract which operates as a bar.[3]

I have considered the evidence and the arguments presented by the parties. As discussed below, I have concluded that the Union has not established that the Employer is still engaged primarily in the building and construction industry, so there can be no 8(f) relationship. Further, I have concluded that the Union's demand to represent the employees, the Union's efforts to compel the Employer to sign a contract obtained in arbitration and the Union's assertion of majority status raise a question concerning representation. Finally, I have concluded that there is no contract bar. Accordingly, I have directed an election in a unit that consists of approximately 7 employees engaged in the manufacture, fabrication and installation of sheet metal products.

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[2] Section 8(f) of the Act permits an employer engaged primarily in the building and construction industry as described more fully in the text herein to enter into a collective bargaining relationship with a union even in the absence of evidence of the union's majority status.

[3] Additional arguments raised by the Union are discussed in the section of this decision titled "QCR Analysis."

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that supports each of my conclusions on the issues.

## I. OVERVIEW OF OPERATIONS

The overall operations of the Employer-Petitioner are the responsibility of its President, Donald L. Messner. Reporting directly to Messner are estimator William Krol, shop foreman Robert J. Glosser and office manager Carolyn Clayton.[4] The Employer has 7 full-time employees engaged in production work.[5]

The Employer's operations are housed in two buildings, which are connected to each other, and which total almost 13,000 square feet. Equipment utilized by the employees includes shears used to cut the raw sheets of metal into various configurations, rolls used to roll the metal, and press breaks and hand breaks used to form the metal. In mid-2006, the Employer purchased a computer press break, and in 2007, the Employer purchased a second computer press break. In the last two years, the Employer has also purchased a large assortment of tooling. The Employer has four vehicles: three stake bed trucks and one utility-type truck.

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[4] The parties have stipulated, and I so find, that Glosser is a supervisor within the meaning of Section 2(11) of the Act in that he has the authority to assign and responsibly direct the work of the employees who are the subject of this proceeding. The parties have further stipulated, and I so find, that Clayton is a supervisor under Section 2(11) of the Act in that she had the authority to assign and responsibly direct the work of the clerical employee, and also has the authority to discipline the clerical employee.

[5] These employees are Eric Blackwell, James Fuller, Ronald Gray, Christopher Hampton, Jacob Hill, Jason Hill and Rick Sunderland. There is also a part-time employee, Tyler Nosel, who attends high school and performs custodial work. The Employer identified two other employees, who are not currently working, as having an expectation of recall: William Badger and Mark Eck. Badger is a high school student who performs custodial and delivery work during the summers. Eck is currently in the armed services, but his job classification is not set forth in the record.

Employees performing custodial work are not eligible to vote in the election directed herein. Hence Nosel and Badger are not eligible to vote. In addition, Badger's status as a student working only summers also renders him ineligible to vote, Crest Wine and Spirits, Ltd., 168 NLRB 754 (1967). Unit employees in the military services of the United States may vote if they appear in person at the polls.

In 2006, the Employer's operations generated about $1,795,859 in gross revenue. Through the first eleven months of 2007, the Employer's operations generated about $2,073,062 in gross revenue.

## II. LABOR RELATIONS HISTORY

The parties have had a collective bargaining relationship for over 30 years, and there have been successive collective-bargaining agreements, including one effective by its terms from May 1, 2002 through April 30, 2007. On the expiration of that 2002-2007 contract, the Employer repudiated the collective bargaining relationship. The Union filed an unfair labor practice charge against the Employer alleging, inter alia, that the Employer's withdrawal of recognition violated the Act. The charge was dismissed, and the dismissal was upheld on appeal based, in relevant part, on the fact that the 2002-2007 contract was a Section 8(f) contract, permitting the repudiation of the relationship upon its expiration. On May 29, 2007, the Employer filed the instant petition.

The 2002-2007 contract contained a clause providing interest arbitration in the event that the parties failed to negotiate a renewal contract.[6] The Union filed for interest arbitration, and on June 11, 2007, the Union obtained an arbitration ruling that the Employer is bound by a successor contract, which was retroactively effective to May 1, 2007 and expires on April 30, 2010.

## III. NATURE OF WORK PERFORMED

The record discloses that, for purposes of this proceeding, the Employer's operations in 2006 and 2007 may be divided into three general categories: manufacturing work in the shop, work at new construction sites, and work at existing sites, each of which is discussed separately below.

[6] Article X, Section 8 provides: "In addition to the settlement of grievances arising out of interpretation or enforcement of this Agreement as set forth in the preceding sections of this Article, any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement shall be settled as hereinafter provided: . . ."

### A. Manufacturing

For some of its major customers, the Employer repeatedly makes the same items, but performs no installation work. For example, for Construction Specialties (CS), the Employer manufactures and delivers stainless items such as guards, but performs no installation work. For Roof Maintenance, Inc., the Employer manufactures gutters and coping, but performs no installation work. For RJF International Corp., the Employer manufactures and delivers guards, but performs no installation work.

In 2006, the Employer's sales from manufacturing work performed in its shop for its major customers accounted for about 49 percent of its revenue. In the first 11 months of 2007, the Employer's sales from manufacturing work performed in its shop for such customers accounted for about 68 percent of its revenue.[7] According to the Employer, this increase in percentage of revenue attributed solely to manufacturing reflects the changing nature of its business from fabrication and installation to manufacturing.

For other major customers, the Employer provides both manufactured items, and performs work in the field not related to such manufacturing, but the Employer's records do not give the total revenue derived from only the manufactured items. For example, for Lonza, Inc., the Employer makes items in the shop, and also performs unrelated work on machines at Lonza's facility. This customer accounted for over $88,000 in revenue in 2006 and over $54,000 in revenue in 2007. The percentage of total revenue attributed solely to manufacturing listed above does not include those customers, such as Lonza, for whom unrelated field work is performed. As a result, the percentage of total revenue attributed solely to manufacturing is even higher than the percentages identified above.

[7] As noted, these figures include delivery on some items. These figures were calculated from the Employer's sales records of its major customers for 2006 and 2007, as explained by the shop foreman.

**B. Work at New Construction Sites**

The record reflects that two of the Employer's jobs in 2006 and 2007 involved work at new construction sites: the fabrication and installation of stainless steel gutters for Zartman Construction in 2006 and the fabrication and installation of stairs and handrails at an office building under construction for Centura Construction in the summer of 2007.

The Zartman Construction job used one employee working on site for about 1 to 1½ days. The Zartman Construction job generated about $3000 to $5000 in revenue, which is less than one percent of the Employer's 2006 gross revenue.

The Centura Construction job used 3 to 4 employees working at the site off and on for 7 to 15 days. The total revenue generated by the Centura Construction job was about $50,000 to $53,000, which is about 2.6 percent of the Employer's 2007 gross revenue.

**C. Work at Existing Sites**

The Union called seven former employees to testify in detail about the work they performed during the relevant time period.[8] These employees had worked at the Employer for varying amounts of time, from 2 weeks to 24 years, and last worked for the Employer at varying times from February 2006 to April 2007.

Their detailed description of the work performed in the field at existing sites covers a broad range of items which can be made from sheet metal. For example, in about January 2006, Sharrell Knipe[9] worked on a small job at Denny's Donuts installing a new table top on an existing frame. Knipe described his longest job during the relevant time period as connecting a

[8] These employees were Sharrell Knipe, Daniel Satteson, Jeff Fuller, Chris Everetts, Parvin ("Pete") Miller, Tom Starkes and Frank Narish. I take administrative notice that five of these employees were also the subject of Case 6-CA-35626: Satteson, Fuller, Miller, Starkes and Narish. In that case, it was determined that the circumstances under which each of the those employees ceased working for the Employer did not violate the Act.

[9] Knipe was a 24-year employee who last worked for the Employer in February 2006. He estimated that at the end of his employment, he spent 75 percent of his time in the field.

new machine to an existing dust collection system at Ceralin Corporation in about February 2006.

As another example, Tom Starkes only worked for the Employer for 80 hours in August 2006. Starkes spent all of his time at First Quality Tissue connecting new pieces of machinery used to manufacture paper towels to existing air and water lines. Two other employees, Dan Satteson and Eric Edkin, also worked with Starkes on this job, spending about two more weeks on the job than did Starkes.

As shown by these examples, the employees fabricated and installed a variety of types of sheet metal items at existing sites, many of which related to the customer's machinery or a specialized use of the structure. On some of the jobs described by the Union witnesses, for example, on jobs which related to the set up of new machinery in a factory, there may have been other crafts, such as electricians, working at the site at the same time.

In the instances where the Employer is fabricating and installing an item, the Employer tries to have the employee who fabricates the item install it as well. An employee may go to a customer's facility, measure or dismantle the piece being worked on, then return to the shop to fabricate the desired item, and then return to the customer's facility to install the item. The Employer pays the same rate of pay for manufacturing, fabrication and installation work.

The employees spend varying amounts of time working in the shop and the field. The estimates of the former employees as to the time spent working in the shop and field in 2006 and 2007 were as varied as their employment with the Employer, ranging from 75 percent of the time in the shop to 100 percent of the time in the field. Further, it appears that the length of time that employees have worked for the Employer has varied greatly, from over two decades to only two weeks. While employees have been regularly referred by the Union, including the very long term employees, there is no evidence showing a pattern of referrals for specific jobs in the two years preceding the hearing.

## IV. OTHER FACTORS

The Employer, in support of its contention that it is no longer engaged primarily in the building and construction industry, also relies on the fact that its classification for worker's compensation insurance purposes was recently changed from a classification reflecting that it was engaged primarily in the manufacture and installation of ductwork and other HVAC component parts to a classification reflecting that it is engaged primarily in the manufacture of custom metal parts, made according to customer specifications, installing a small amount of the products made. The record reflects that this change in classification was based on the Employer's report of its own operations, and resulted in a reduction of the Employer's premium.

On the other hand, the Union, in support of its assertion that the Employer continues to be engaged primarily in the building and construction industry, points to the fact that the Employer's name on its letterhead, and on the expired contract, identify the Employer as "M & M Sheet Metal" without any reference to "Steel Fabricators." In response, the Employer states that since 1987 its full legal name has been "M & M Sheet Metal & Steel Fabricators, Inc."

Finally, the Union relies on the testimony of its Business Manager to the effect that the operations of this Employer are substantially similar to the operations of the 30 other employers within its geographic jurisdiction who are covered under its contract. According to the Business Manager, approximately 35 to 40 percent of the work of these other employers consists of retrofitting existing structures. It is the opinion of the Business Manager that all work performed by these other employers, and the Employer herein, is construction work, regardless of whether it is performed in the shop, or at a new construction site, or is retrofitting an existing structure.

## V. 8(f) ANALYSIS

As noted, the Union contends that it merely wants to continue the parties' 8(f) relationship. In order for an employer and a union to lawfully enter into an 8(f) contract, three requirements must be met: (1) the agreement must cover employees engaged in the building and construction industry; (2) the agreement must be with a labor organization of which building

and construction employees are members; and (3) the agreement must be with an employer engaged primarily in the building and construction industry. Painters Local 1247 (Indio Paint), 156 NLRB 951, 957 (1966), citing Animated Displays Co., 137 NLRB 999, 1020-1021 (1962).

The Act does not define the term "building and construction industry." However, the Board has approved the definition of building and construction work as "the provision of labor whereby materials and constituent parts may be combined on the building site to form, make, or build a structure." Painters Local 1247, supra at 959. The Board has also noted that "[c]onstruction covers those types of immobile equipment which, when installed, become an integeral [sic] part of the structure and are necessary to any *general* use of the structure. This includes such service facilities as plumbing, heating, air-conditioning, and lighting equipment . . . In general, construction does not include the procurement of special purpose equipment designed to prepare the structure for a *specific* use." Painters Local 1247, supra at 958; C.I.M. Mechanical Co., 275 NLRB 685, 691 (1985); South Alabama Plumbing, 333 NLRB 16, 22 (2001).

While the Board has approved a broad definition of construction, which encompasses both the installation and "[t]he cost of materials and equipment installed," C.I.M. Mechanical Co., supra at 689-690, citing Painters Local 1247, supra, the Board has not accepted an expanded definition which would include the manufacture of items which involve little or no installation by the employer, Central Arizona District Council of Carpenters (Wood Surgeons, Inc.),175 NLRB 390, 391-392 (1969).

In making the determination of whether the Employer is engaged primarily in the building and the construction industry, the Board has approved consideration of such factors as the percentage of the employer's gross revenue derived from the building and construction industry, Painters Local 1247, supra at 960; C.I.M. Mechanical Co., supra at 691; Central Arizona District Council of Carpenters (Wood Surgeons, Inc.), supra at 391-392; as well as the percentage of employees performing such work and the time spent on such work, Painters Local 1247, supra

at 960. Further, the Board has looked for guidance to the North America Industry Classification System (NAICS), published by the Department of Labor's Census Bureau.[10]

Additionally, the Board also considers Congress' rationale for adopting Section 8(f) when determining its applicability. Forest City/Dillon-Tecon, 209 NLRB 867, 869-870 (1974). Congress recognized that Section 9 of the Act was not consistent with certain circumstances that often arise in the construction industry. Thus, Congress deemed 8(f) pre-hire contracts appropriate because, inter alia, employers needed to know their anticipated labor costs in order to effectively bid on construction projects even though they may not yet have hired any employees. Id.[11]

A party claiming that it is privileged under Section 8(f) to enter into a contract without the union establishing its majority status has the burden of proof in showing an employer is engaged primarily in the building and construction industry. See Bell Energy Management Corp., 291 NLRB 168, 169 (1988), citing Painters Local 1247, supra. Thus, the Union has the burden of proof in this proceeding.[12]

I shall next consider the Employer's operations in light of the factors the Board has set forth to determine if the Employer is engaged primarily in the building and construction industry.

**A. Gross Revenue**

In 2006, the Employer's revenue from manufacturing performed in its shop for customers which involved no installation by the Employer accounted for at least 49 percent of its gross revenue. In the first 11 months of 2007, the Employer's revenue from manufacturing performed

[10] In 1997, the NAICS replaced the Standard Industrial Classification Manual that the Board had previously looked to for guidance. See, e.g., U.S. Abatement, 303 NLRB 451, 456 (1991); Painters Local 1247, supra at 958.

[11] In contrast to a Section 8(f) relationship, a Section 9(a) relationship must be premised on the Union establishing majority status.

[12] Although the Union has also asserted that it has majority status, see discussion infra at page 15, majority status has never been established.

in its shop for such customers accounted for at least 68 percent of its gross revenue. Thus, presently, at most only 32 percent of the Employer's gross revenue is related to traditional sheet metal fabrication and installation work. This evidence is consistent with the Employer's purchase of two computer press breaks, and its position that it has been transitioning from the fabrication and installation sector of sheet metal work into the manufacturing sector.[13]

Further, a portion of the Employer's fabrication and installation work is related to the installation, enhancement and repair of equipment, such as the repair or replacement of a broken guard or the addition of an air line to a piece of machinery, or to the modification of the structure for specialized purposes, such as the modification of a dust collection system related to a manufacturing process. This is not the type of work necessary to maintain a structure for its general purpose as contemplated by the Board's definition of construction.[14]

Thus, in addition to the 68 percent of the Employer's revenue derived from manufacturing work in 2007, the Employer has also derived significant revenue from fabrication and installation which was not "an integral part of the structure" and/or "not necessary to any general use of the structure" during that period, making the percentage of gross revenue attributable to construction work as defined by the Board to be even less than 32 percent. The Board has affirmed a Trial Examiner's finding that an employer whose on-site installation work constituted 31 percent of its sales was not primarily engaged in the construction industry. Central Arizona District Council of Carpenters (Wood Surgeons, Inc.), supra at 391-392.

[13] In this regard, I have not considered the change in the Employer's status for worker's compensation purposes because that change was predicated on the Employer's interpretation of construction as limited to new construction, and not on the Board's definition as set forth in the text above.

[14] Compare South Alabama Plumbing, supra at 22 (repairs to and replacement of plumbing related to integral parts of an immobile structure is "construction" as used in Section 8(f) of the Act); U.S. Abatement, Inc., supra at 455-456 (asbestos removal, like replacement, necessary to the maintenance of buildings and permanently attached equipment and fixtures, was construction work).

Similarly, in addition to the 49 percent of the Employer's revenue derived from manufacturing work in 2006, the Employer derived significant revenue from non-construction work at existing sites during that period as well, likely making the percentage of gross revenue attributable to construction work to be considerably less than 50 percent. While the precise figures are not available, it is clear that on this record, the revenue does not establish that the Employer was engaged primarily in construction work in 2006.

**B. Hours Attributed to Different Work**

While the Union has adduced testimony regarding the amount of time employees spent in the field and the shop, this testimony is inconclusive at best. First, the testimony does not reflect the operations of the Employer as of the date the petition was filed or since that time. All of the employees who testified had ceased working for the Employer before the petition was filed in this case. Second, as illustrated in the examples given above, it appears that almost all of the work in the field described in their testimony was related to specific equipment used in a manufacturing process or a specialized use of the structure, neither of which is within the Board's definition of the building and construction industry as used in Section 8(f) of the Act.

**C. NAICS**

In determining whether particular types of work should be considered construction work, the Board has looked to the NAICS for guidance.[15] NAICS Section 238220 is entitled "Plumbing, Heating, and Air-Conditioning Contractors" and states:

> This industry comprises establishments primarily engaged in installing and servicing plumbing, heating, and air-conditioning equipment. Contractors in this industry may provide both parts and labor when performing work. The work performed may include new work, additions, alterations, maintenance, and repairs.

This description appears to be consistent with the Board's definition of building and construction work.

[15] I have taken administrative notice that NAICS and the Standard Industrial Classification Manual are available on the website maintained by the U.S. Census Bureau.

NAICS also has a classification for sheet metal manufacturing. Section 332322 is entitled “Sheet Metal Work Manufacturing” and states: “This U.S. industry comprises establishments primarily engaged in manufacturing sheet metal work (except stampings).” Thus, NAICS recognizes that sheet metal employers can be engaged in construction or in manufacturing. Again, this is consistent with the Employer’s transition from one sector of the industry to another as shown in the present record.

**D. Section 8(f) Considerations**

The Union has not demonstrated that the considerations underlying Section 8(f) apply to the present operations of the Employer. The Employer’s manufacturing work for its major customers is not like that on a typical project where 8(f) contracts are signed to ensure that employers know what labor costs will be when bidding on projects and before hiring employees. Rather, the Employer’s shop work for its major customers requires that the Employer's employees work on a continuing basis, suggesting the need for a "permanent and stable" workforce, which tends to militate against finding 8(f) status. See C.I.M. Mechanical, supra at 690-691.

Here, the Union asserts that the Employer is still engaged primarily in construction work because the majority of the Employer’s work is new or rehab commercial construction. However, the Union has failed to present sufficient evidence to support this claim. To the contrary, the evidence demonstrates that the Employer has transitioned from being engaged primarily in the fabrication and installation of sheet metal items to being engaged primarily in the manufacture of products in its shop. Accordingly, examining the factors set forth in the caselaw, I conclude that the Employer is no longer engaged primarily in the building and construction industry, as required for the existence of a Section 8(f) relationship.

## VI. QCR ANALYSIS

In the present case, the Union first attempted to avoid an election by maintaining that it only desires to maintain its 8(f) status.[16] However, because the Union has not established that the Employer is presently engaged primarily in the building and construction industry, the Union cannot be the representative of the employees under Section 8(f) of the Act.

Although the Union has consistently asserted that it has an 8(f) relationship with the Employer, that is, one not based on a previous demonstration of majority status, the Union nonetheless argues in its brief that the Employer "has no good faith basis to believe a lack of majority status." [17] In addition, the Union's brief argues, contrary to the record, that the Employer "only contends that the relationship is a Section 9 relationship instead of the prior-existing 8(f) relationship." The Union further states that "a contract will remain a bar after the conversion of the bargaining relationship. . . ." Inasmuch as neither the Employer nor the Union has in fact ever contended that in the past, they had a 9(a) relationship based on a demonstration of majority status of the Union,[18] I need not address this contradictory argument of the Union.[19]

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[16] A request for an 8(f) contract does not raise a question concerning representation warranting an election since it is not premised on a claim of majority status. Western Pipeline, Inc., 328 NLRB 925 (1999).

[17] To raise a question concerning representation to support an RM petition when there is an incumbent 9(a) union, an employer must have a "good-faith reasonable uncertainty" that a majority of the unit employees continue to support the union under Levitz Furniture Co., 333 NLRB 717 (2001).

[18] The Employer has not voluntarily recognized the Union, and the Union has never been certified as the majority representative. In VFL Technology Corp., 329 NLRB 458 (1999), cited by the Union, the employer voluntarily extended Section 9(a) recognition to the union. That has not happened in the instant case.

[19] It should be noted that even if the Union had at some point been the majority representative, the Employer unequivocally withdrew recognition of the Union upon the expiration of the contract in May 2007, well outside the Section 10(b) statute of limitations of the Act. Thus, at the time of the filing of the petition, the Union was not the incumbent recognized bargaining representative of the unit.

When a union does not enjoy 9(a) status and a petition is filed by an employer, as in this case, there must be "a claim to be recognized as the representative defined in [S]ection 9(a) . ." under Section 9(c)(1)(B) of the Act in order to raise a question concerning representation. Union conduct sufficient to constitute an affirmative claim for recognition may take many forms. It may, for example, be picketing, see Bergen Knitting Mills, 122 NLRB 801, 802 (1958) and Rusty Scupper, 215 NLRB 201 (1974), including picketing for an 8(f) agreement, see Elec-Comm, Inc., 298 NLRB 705, 706 fn. 5 (1990).

In the present case, the Union has made a present demand for recognition as the majority status representative. Specifically, at the hearing, the Union's counsel stated "I offered again to [the Employer's counsel] our majority status cards this morning, he refused to look at them, but we do have majority status as well." [20]

In addition, the Union has done much more: it has invoked the interest arbitration clause in the 2002-2007 contract to obtain a successor contract at a time when the Employer was no longer engaged primarily in the building and construction industry and there can be no 8(f) relationship between the parties. While a demand that an employer engaged primarily in the building and construction industry sign an 8(f) contract does not raise a question concerning representation that would support the processing of an RM petition, see Western Pipeline, Inc., supra, in this case, the Employer is not engaged primarily in the building and construction industry and the successor contract cannot be a valid 8(f) contract. Thus, in the circumstances of this case, the Union's demand that the Employer execute a successor contract constitutes a demand for a Section 9(a) relationship.

[20] The same statement is made in the Union's post-hearing brief: ". . . in any event, the Union has demonstrated majority status through cards which the Employer refuses to acknowledge, . . ."

Under the circumstances present in this case, I conclude that the Union's demand that the Employer recognize it as the representative of its employees and its efforts to compel the Employer to execute a contract obtained through interest arbitration when there cannot be an 8(f) relationship, and the Union's offer to show the Employer its "majority status cards" raise a question concerning representation under Section 9(c)(1)(B).

## VII. CONTRACT BAR

The Union also asserts that there is a current contract between the parties which operates as a bar to the instant petition. In this case, the 2002-2007 contract had no automatic renewal clause and expired on April 30, 2007. The instant petition was filed on May 29, 2007. The contract upon which the Union relies for its assertion of contract bar was not awarded until June 11, 2007. The fact that the contract obtained through arbitration on June 11, 2007 purports to be retroactive to May 1, 2007, cannot change the fact that there was no contract in existence at the time the petition was filed. Thus, the petition was clearly filed at a time when there was no contract in existence to operate as a bar.[21]

Accordingly, I shall direct an election in the unit as defined by the parties in the 2002-2007 collective-bargaining agreement.[22]

## VIII. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

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[21] To the extent the Union asserts that the contract obtained through arbitration is an 8(f) contract, the second proviso to Section 8(f) states that when the majority status of the contracting union has not been established pursuant to Section 9, an agreement valid under Section 8(f) will not act as a bar to a petition filed pursuant to Section 9(c) or 9(e). Accordingly, a prehire contract arising under Section 8(f) does not constitute a bar to a petition. John Deklewa & Sons, 282 NLRB 1375, 1385 (1987).

[22] As noted, the Union claims that it represents the employees as described in the 2002-2007 collective-bargaining agreement. Hence, it is the contract's unit description that is used herein. However, that description will be modified slightly to comport with standard Board language used in unit descriptions.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer-Petitioner is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.

3. The Union claims to represent certain employees of the Employer-Petitioner.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer-Petitioner within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer-Petitioner constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees of the Employer engaged in but not limited to the: (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or nonferrous metal work and all other materials used in lieu thereof and of all air-veyor systems and air-handling systems regardless of material used including the setting of all equipment and all reinforcements in connection therewith; (b) all lagging over insulation and all duct lining; (c) testing and balancing of all air-handling equipment and duct work; (d) the preparation of all shop and field sketches whether manually drawn or computer assisted used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; (e) metal roofing; and (f) all related work; excluding office clerical employees, and guards, professional employees and supervisors as defined in the Act.

## IX. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Sheet Metal Workers International Association Local No. 44, AFL-CIO. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

### A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### B. Employer-Petitioner to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer-Petitioner must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be

alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Two Chatham Center, Suite 510, 112 Washington Place, Pittsburgh, PA 15219, on or before February 28, 2008. No extension of time to file this list will be granted, except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 412/395-5986. Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

**C. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer-Petitioner must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) full working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an Employer-Petitioner to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so precludes Employer-Petitioners from filing objections based on non-posting of the election notice.

## X. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001.[23] This request must be received by the Board in Washington by 5 p.m., EST (EDT), on March 6, 2008. The request may **not** be filed by facsimile.

Dated: February 21, 2008

/s/ Gerald Kobell
Gerald Kobell, Regional Director

NATIONAL LABOR RELATIONS BOARD
Region Six
Two Chatham Center, Suite 510
112 Washington Place
Pittsburgh, PA 15219

**Classification Index**
316-6725
393-6007-1700
590-2550-5000

[23] A request for review may be filed electronically with the Board in Washington, D.C. The requirements and guidelines concerning such electronic filings may be found in the related attachment supplied with the Regional Office's initial correspondence and at the National Labor Relations Board's website, www.nlrb.gov, under "E-Gov." On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-Filing instructions explaining how to file the documents electronically will be displayed.